No. 80-951 [Consolidated with No. 78-1545]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and as class representatives,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER IN NO. 80-951

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REPLY BRIEF FOR PETITIONER IN NO. 80-951 *

I. THE FUNDAMENTAL PRINCIPLES WHICH CONTROL NO. 80-951

A.

There are two bases on which an order of a court of law may terminate the contractual or other rights of one person (X) in favor of another person (Y). The first is as a result of litigation, in which it has been determined by the court that Y has been the victim of a legal wrong, and that depriving X of his right is an appropriate remedy for that wrong; it is the essence of due process of law that X may not be deprived of his rights in such a proceeding without having the opportunity to litigate whether Y has been the victim of a legal wrong which makes it appropriate to deprive X of his rights. See, *e.g.*, *Davidson v. New Orleans*, 96 U.S. 97, 102, and *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681, quoted at IFFA Br. 35, 37; *Hansberry v. Lee*, 311 U.S. 32, 44-45, quoted at p. 5, n. 5, *infra*.[1] The second basis for such a judicial

* Throughout this Reply, prior filings in this Court will be referred to by abbreviations as shown in the tabulation below:

Abbreviation	*Reference*
"IFFA Pet."	Petition for Certiorari in No. 80-951
"IFFA Br."	Brief for Petitioner (IFFA) in No. 80-951
"Pl. Br."	Brief for the Plaintiff Class
"Gov't Br."	Brief for the United States and the Equal Employment Opportunity Commission.
"TWA Br."	Brief for Trans World Airlines, Inc.
"Pl. Reply Br."	Reply Brief for Plaintiff Class.
"AFL-CIO Br.	Brief of AFL-CIO as *amicus curiae*
"EEAC Br."	Brief of Equal Employment Advisory Council as *amicus curiae*
"J.A. Vol. I" and "J.A. Vol. II"	Joint appendix of the parties in these consolidated cases, see IFFA Br. 1, n.1

[1] Only one of our adversaries, TWA, even attempts to do business with the serious due process objections to the judgment below. TWA's response is that the requirements of *Davidson* and *Brinkerhoff-Faris* were met because the "union here had the opportunity

order is the consent of X, that is, by a settlement of the litigation; again, X is entitled as a matter of due process to determine for itself whether to settle or to litigate the merits of Y's claim. See, *e.g.*, *United States v. Armour Co.*, 402 U.S. 673, 682, quoted at IFFA Br. 25-26, 37.[2]

B.

We now apply these fundamental principles to this case. The union, IFFA, is in the position of X; it had a contractual right by virtue of its collective bargaining agreement with TWA, which established the seniority rights of employees in the collective bargaining unit covered by the agreement. That contractual right, like other contractual rights, is not absolute; it is subject to defeasance by the sovereign by operation of positive law. Specifically, this Court has held in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, that where a court has adjudicated that individuals are victims of discrimination in violation of Title VII of the Civil Rights Act, the Court may, in the exercise of its remedial powers under § 706(g) of that Act, award to those individuals the

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to appear and be heard" (TWA Br.31; see also *id.* at n. 14). But the union did not have the opportunity to be heard *on the issue of whether the plaintiffs had been the victims of a legal wrong*, and were thus entitled to relief overriding the seniority provisions of the collective bargaining agreement. As we explain in the text, *infra*, it was on such a finding that the power of the District Court to enter the seniority order depended, absent consent by the union.

[2] Here again our adversaries' failure to respond is revealing. Only plaintiffs' brief refers to *Armour*, quoting it for the point that settlements constitute a compromise, and are entered into by the settling parties on the basis of their estimates of cost savings and elimination of risk. This proposition is uncontroverted, but has nothing to do with the issues in this case. For, while it undoubtedly explains why plaintiffs and TWA determined to settle the case *between themselves*, the sentence quoted by plaintiffs does not deal with the question whether they were empowered to make that judgment for IFFA (or to empower the court to make that judgment on the basis of what is "fair and reasonable"). That they could not do so is plain from *Armour*, which we quoted, and particularly this Court's affirmation that the "right to litigate the issues raised [is] a right guaranteed * * * by the Due Process Clause" (402 U.S. at 682).

seniority position which they would have had but for that violation, notwithstanding any contrary provisions in the collective bargaining agreement. The Court has made clear, both in *Franks* itself, and in subsequent cases (see IFFA Br. 27-30, AFL-CIO Br. 11) that the remedial power of a court to award such "rightful place" seniority is predicated on the determination that the beneficiaries of the seniority award "have carried their burden" (*id.* at 772) of showing that they are the victims of a legal wrong; this is clear also from the language of § 706(g), quoted in *Franks* (*id.* at 762-763, n. 19, see IFFA Br. 28), and in the very idea of a judicial remedy. Further, a union whose contractual rights are subject to being overridden under the *Franks* principle is entitled to litigate the question whether the conditions of a *Franks* remedy have been satisfied, see AFL-CIO Br. 12-14, discussing *Teamsters v. United States*, 431 U.S. 324, 356, n. 43.

Specifically, in this case, litigation of the question whether the plaintiffs have a legal entitlement to "rightful place" relief turns on two issues—whether TWA's pregnancy-motherhood policy constitutes sex discrimination in violation of Title VII, and whether plaintiffs' claims are time-barred, for a "discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." (*United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558). IFFA was entitled to litigate both of those issues before the Court could exercise its authority under § 706(g) to enter an order overriding the contractual seniority provisions. IFFA was not given that opportunity.

Alternatively, a union may by settling (or by limiting the scope of its defense against particular plaintiff-individuals or subgroups) relinquish its contractual rights in whole or in part. This too is recognized in *Franks*, 424 U.S. at 778-779, quoted and discussed at pp. 18 to 20, *infra*. Nothing in the language or policy of Title VII purports to diminish that right by a scintilla; nor could it constitutionally do so. Much is said

in the briefs on the other side concerning Congress' "strong preference for encouraging voluntary settlement of employment discrimination claims", *Carson v. American Brands, Inc.*, 450 U.S. 79, 88; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44. These cases, relied on in each of the briefs on the other side[3] only reinforce our view of Title VII, for of course, the Court in both instances used the word "voluntary" in describing the settlement and conciliation which Congress favored.

C.

Much confusion is traceable to the class nature of the plaintiffs' suit, for the courts below determined whether the settlement was to be imposed upon the defendant IFFA by applying the standard for approving or disapproving a settlement over the objection of members of a *plaintiff* class (see IFFA Pet. 4a-5a, 16a-19a). That confusion comes about because of the failure to appreciate the fundamental difference between situations in which plaintiff class members' rights are at issue and those in which the defendant's rights are at issue.

Inquiry into the fairness of a settlement to absent members of a class assumes that the plaintiffs are a class for purposes of F.R. Civ. Rule 23, that is, that the absent members are adequately represented by the named plaintiffs who are before the court. If that condition is not met, the absent members cannot be bound by the settlement no matter how fair and reasonable it is determined to be, and their claims cannot be barred.[4] Thus, the court's determination that the settlement is fair and reasonable is not a substitute for, but supplements the class members' due process rights. For, "[I]t is familiar

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[3] Pl. Br. 38, n. 87; Gov't Br. 24, 25, 26, text and note at n. 28; TWA Br. 16-17; EEAC Br. 6, 8.

[4] In particular cases the court's determination of the adequacy of the representation and the fairness and reasonableness of the settlement may occur simultaneously, because objectors will frequently oppose a settlement on both grounds. But what matters for present purposes is that a settlement will not be approved unless adequacy of representation, and the fairness and reasonableness of the settlement are both established.

doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present," (*Hansberry v. Lee*, 311 U.S. 32, 42-43). But *Hansberry* also made clear that adequacy of representation is the constitutional *sine qua non* for binding the absent members, see *id.* at 44-45 quoted in the margin.[5] The same principles of due process which preclude the entry of a binding judgment against absent members of a class who are not adequately represented, forbid the entry of such a judgment against a nonmember of the class without affording it the opportunity to litigate the merits.

Indeed, that was the precise situation in *Hansberry*, where the plaintiffs in the original suit (to which binding effect was sought to be given in the second suit) had brought a plaintiffs' class action, but had not named a defendant class or sought relief against anyone other than the original named defendants, see *id.* at 45-46. Here, the District Court could have been under no illusion that either the plaintiffs (who proposed the entry of the seniority order) or TWA (which, in compliance with the settlement agreement at the very least failed to oppose such order) was representing the interests of the

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[5] Justice Stone wrote:

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. [311 U.S. 44-45.]

union; nor do either of these parties contend in this Court that they did so. (But see Gov't Br. 28, n. 31 discussed at pp. 9-10, n. 10, *infra.*) Thus, the last sentence of Justice Stone's opinion for the Court in *Hansberry* is very much in point:

> For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests it does not appear that they could rightly discharge. [311 U.S. at 46]

And the Court's conclusion in *Hansberry* that the petitioners there were deprvied of due process of law by the entry of a judgment affecting their rights without allowing them to litigate the issues on which those rights depend,[6] compels the conclusion that the judgment below deprived petitioner of due process of law. Because of the total absence of statutory authority for the judgment under review that constitutional infirmity need not be the basis for reversal. Nonetheless it is well to have in mind, in considering the submissions which have been made in support of that judgment, just how far that judgment departs from established processes of adjudication.[7]

II. RESPONSE TO SEPARATE OPPOSING BRIEFS

A. *The Merits.*

Individually, and collectively, the points made by our adversaries insofar as they discuss on the merits the

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[6] There it was the defense that the restrictive covenant had never become effective because of an inadequate number of signatures, see 311 U.S. at 38; this was the issue that had been determined in the original suit to which the Illinois courts gave *res judicata* effect by the judgment reversed in *Hansberry*.

[7] Moreover, even if there were a statutory argument in favor of that judgment, "Congressional solicitude for fair procedures, absent explicit statutory language to the contrary" would militate against such an interpretation. *Califano v. Yamasaki*, 442 U.S. 682, 693, citing *Greene v. McElroy*, 360 U.S. 474, 507-508.

issue of the Court's power to override the seniority provisions of the collective bargaining agreement reduce to two propositions: 1) The order is valid as "rightful place" seniority relief; and 2) there is a policy favoring settlement of Title VII actions which would be frustrated if the union were permitted to insist on litigating whether plaintiffs have a Title VII right to have the collective agreement overridden in their favor. Both of these propositions are so patently without merit that it would unduly extend this brief to respond in detail to the various formulations in the three briefs on the other side.

1) Contrary to plaintiffs' principal contention, Gov't Br. 31, and TWA Br. 21-23, ¶¶ (b)-(d), the order cannot be sustained on the basis that subclass B is legally entitled to the relief awarded.[8] The presence in this Court of Nos. 78-1545 and 78-1549 should suffice to make it clear that the factual predicate for such relief—a judicial determination that there has been illegal discrimination—has not been satisfied. (See also pp. 10-18, *infra*). And *Franks* and its progeny make clear that such a determination is the statutory condition for a contested award of "rightful place" seniority overriding a contract. See pp. 2-3, *supra*. The objection at Gov't Br. 25-26 that we give "too much emphasis to the particular facts of *Franks*" is specious; the single fact we relied on was that the plaintiff had established illegal discrimination—proof which was treated as the predicate for the remedy

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[8] Gov't Br. 31 says:

"[T]he district court had already granted summary judgment on liability, and that holding had been affirmed." As regards the claims of the Subclass B members, that statement is wrong. The Government apparently defines the term "liability" in some abstract sense, without regard to the timeliness of the claims in question. To do so is contrary to *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, quoted at p. 3, *supra*. In simple terms, there is no "liability" for time-barred claims, and an appellate decision, as here, that claims are untimely is not affirmance of a "judgment on liability." Thus, it distorts meaning to refer to the order on review as awarding "rightful place" seniority (Gov't Br. 29 n. 30; 30 n. 33).

in the *Franks* opinion itself (424 U.S. at 762-770) and in the other decisions of this Court quoted at IFFA Br. 27-30.[9]

2) Reliance on Title VII's policy concerning settlements at Pl. Br. 38-39; Gov't Br. 25-27; TWA Br. 16-18 is wholly misplaced because that policy is one favoring *voluntary* settlements, see pp. 3-4, *supra*. Neither Title VII nor any other law give a court power either express or implied (TWA Br. 17) to impose a "nonconsensual consent decree". *High v. Braniff Airways*, 592 F.2d 1330, 1335 (5 Cir.).

Plaintiffs and TWA complain because IFFA would require them to litigate, rather than settle; but it is IFFA that is truly aggrieved—for plaintiffs and TWA would have the Court deprive IFFA of its contractual rights without affording IFFA the opportunity to litigate the issue of liability. Thus, what is deprecated as "union veto power" over settlement (Gov't Br. 28, 31) is only that which, in the nature of our system, any party has

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[9] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (Gov't Br. 25), while not involving seniority, likewise treats the Court's remedial power as depending on an established violation of law. See also *University of California Regents v. Bakke*, 438 U.S. 265, 307-309 (Opinion of Powell, J.).

Myers v. Gilman Paper Co., 544 F.2d 837, on rehearing, 556 F.2d 728 (5th Cir.), *certiorari dismissed*, 434 U.S. 801, refutes the proposition that a court may impose a retroactive seniority remedy overriding union contractual rights based not upon a judicial finding of violation but upon a settlement agreement between plaintiffs and the employer. In *Myers*, the seniority remedy which the court approved (Gov't Br. 30, n. 33) *was* based upon a judicial finding of violation. The Fifth Circuit's subsequent vacation of the decision insofar as it allowed even that relief confirms that the source of the judicial power to enter the relief in the first instance was not the settlement agreement but the judicial finding of a Title VII violation. See also that court's discussion of *Myers* in *Southbridge Plastics Division, Etc. v. Local 759, Etc.*, 565 F.2d 913, 916 (5 Cir.). Of course, neither TWA nor the government addresses, much less impeaches, the *reasoning* of *Myers*, quoted at IFFA Br. 33-34, which we commend to this Court.

before his rights may be taken from him: the power to defend his rights through the adjudicative process. It is entirely true, that if a union is unwilling to give up its contractual rights voluntarily "Title VII plaintiffs to secure seniority relief * * * could be required under IFFA's theory to litigate to the bitter end even the most patently meritorious claims." (Gov't Br. 27). That, as Justice Brandeis long ago taught, is the nature of our legal system: "Law suits * * * often prove to have been groundless; but no way has been discovered of relieving a defendant of the necessity of a trial to establish the fact." (*Myers v. Bethlehem Corp.*, 303 U.S. 41, 51-52). Plaintiffs are in no better position—their claims may be "patently meritorious" and the defenses may be "groundless", but no way has been discovered—or should be created here—of relieving a plaintiff from the necessity of a trial to establish that through the normal legal processes.[10]

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[10] The possession of that power does not however mean, as the Government suggests, that settlements will not occur. (Indeed, plaintiffs and TWA here have agreed to settle even if retroactive seniority is disapproved; so can plaintiffs and employers settle other Title VII claims without the presence of the union as long as they do not interfere with collective bargaining rights.) The Union has such incentives to settlement as are normally present: the desire to avoid the expense of litigation; the uncertainty of the result of litigation; and, in a Title VII case, the possibility of having to pay the plaintiffs' attorneys' fees.

The government advances two reasons why "it is unlikely that employers will thoughtlessly bargain away seniority rights simply to settle litigation, as IFFA suggests" (Gov't Br. 28, n. 31). Of course, we did *not* suggest that TWA acted "thoughtlessly"; on the contrary, we observed at IFFA Br. 21-22 that by the agreement TWA would eliminate a very substantial financial liability, albeit only a potential one. These are considerations which TWA was entitled to consider in its own "self interest" (Gov't Br. 28, n. 31) in deciding whether it wished to settle (*Armour, supra*). But the union's right to determine whether to settle or not has the same dignity under law. The government suggests the contrary by arguing (Gov't Br. 29): "Where, as here, a union faces no prospect of [financial] liability, and is not therefore subject to countervailing influences, the union's course of action will be dictated by its members' interests." But the union is "subject to

B. *Plaintiffs' Attempted Evasion Of The Merits.*

1. Plaintiffs would have it appear that the Order of the district court awarding retroactive seniority, which was affirmed by the Court of Appeals in the judgment under review in No. 80-951, was based not on the Settlement Agreement between plaintiffs and TWA but on the district court's finding of a violation. (Pl. Br. 18-24). This is demonstrably false, as shown by the orders of the district court which we reproduce in pertinent part in the margin.[11]

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countervailing influences" (see above), and in any event has the right to make its own choice and act accordingly. It has that right both under ordinary legal principles and under the policies of the Railway Labor Act. The employer is not the bargaining representative of the employees; nor can it by agreement with another litigant empower a Court to determine whether the enforcement of collective bargaining rights is "fair and reasonable."

[11] The district court entered two simultaneous orders on November 8, 1979. The first was entitled "Order Approving Settlement and Dismissing Actions":

> The court has considered the proposed Settlement Agreement, as amended, for the compromise of these actions and has considered the written and oral presentations of the parties under Rule 23(e), F.R.C.P. The court finds that proper notice of the proposed settlement and the hearings thereon was given to the members of plaintiff class and Subclasses A and B; and that no class member objected to the settlement. The court also finds that the settlement agreement is fair, reasonable, and adequate for the parties and Subclasses A and B.
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> * * * *
>
> The court retains jurisdiction:
>
> (a) to determine the total amount of seniority and credit for length of service (both accrued and retroactive) for re-employed class members as provided in Section V B of the Settlement Agreement as amended,
>
> (b) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,
>
> (c) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of eligibility of class members, and .... [IFFA Pet. 16a-17a.]

The Court also entered an "Order Awarding Seniority" which provides in pertinent part as follows:

We note specifically that the court referred to both § 706(g) of the Civil Rights Act of 1964, its remedial provision, and to the Settlement Agreement. While the latter reference clearly refutes the plaintiffs' contention that the Order was not based on the Settlement Agreement (as does much of the other language of the Orders we have quoted), the reference to § 706(g) cannot be taken as indicating that the district court was entering the Order on the basis that it was remedying a found violation of Title VII. There is no recitation to that effect in either of the Orders, and the references to the Settlement Agreement would have been entirely superfluous if the district court had been remedying a statutory violation.

The court having considered the evidence, testimony and briefs which have been submitted in connection with the issue of seniority, pursuant to Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) and Section V of the Settlement Agreement, as amended, and the court finding that full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases, it is ordered that each class member who is now employed as a TWA flight attendant or who will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period", as defined in the Settlement Agreement (at page 3), less the deductions provided therein (at p. 8), the terms of which are incorporated by reference and are adopted as part of this Order.

The court having approved the Settlement Agreement in a separate order, it is ordered that this case be, and is hereby, dismissed. * * *

However, this court hereby retains jurisdiction:

(a) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(b) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of any eligibility of class members, and . . . [IFFA Pet. 18a-19a].

Moreover, the entire posture of the litigation is contrary to the plaintiffs' interpretation of what the district court did. For, when Judge McGarr, then the District Judge in this case, entered his October 18, 1976 Order awarding summary judgment to plaintiffs against TWA on the merits, he did not decide the scope of the relief to which the plaintiffs were entitled, but instead certified the case to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). (J.A. I, 133a-135a). It was on that appeal that the Court of Appeals affirmed the district court with respect to subclass A, but reversed as to subclass B. (IFFA Pet. 40a-59a). Plaintiffs and TWA then filed petitions for certiorari to review that judgment (Nos. 78-1545 and 78-1549 in this Court). While those petitions were pending they asked this Court to hold them in abeyance in order that they might undertake settlement negotiations. When those negotiations culminated in an agreement between those parties, they invoked the jurisdiction of the district court for the purpose of approving that settlement. It is in this context that the union was granted leave to litigate the question whether the Settlement Agreement should be approved, but not to litigate the merits of the underlying Title VII case. By an order of September 14, 1979, the court (now Roszkowski, J.) overruled the "Union-Intervenor's objection to this court's jurisdiction and authority to approve the proposed settlement agreement" (IFFA Pet. 13a). That order too, makes clear the basis on which the district court was proceeding, and further confirms that its Orders, less than two months later, were orders approving the Settlement Agreement, rather than remedying a violation which it had previously found, but as to which the Court of Appeals had reversed its decision with respect to subclass B.

At the outset of its opinion affirming the awarding of retroactive seniority, the Court of Appeals stated that the

> . . . issue in this appeal is whether the district court properly approved a settlement agreement

> terminating almost a decade of litigation regarding the claims of the plaintiffs that defendant TWA's policy between 1965 and 1970 of terminating female flight attendants who became mothers was sex discrimination in violation of plaintiffs' rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* [IFFA Pet. 2a]

The Court of Appeals' description of the proceedings which culminated in the entry of the orders on appeal is also wholly inconsistent with plaintiffs' version. (See IFFA Pet. 4a.) And its discussion of the merits of the appeal makes clear that it affirmed the judgment on the basis that it was a settlement, rather than remedy for a violation of the rights of Subclass B, whose claim it had previously rejected as time-barred. (*Id.* at 4a-10a.)

2. We have shown that the courts below purported to find the authority to impose retroactive seniority in favor of subclass B in the settlement agreement, not in § 706(g). We now show that authority *could not* have derived from § 706(g), for the necessary predicates for imposition of a remedy under § 706(g) were lacking here. In order to provide relief under § 706(g), it is not enough that the court find the employer to have acted in a manner inconsistent with the substantive commands of Title VII; it is necessary as well that the employer's conduct be challenged in a manner permitting judicial enforcement of Title VII. Where the latter condition is absent—where, for example, the employer's conduct was not challenged within the time limits specified in Title VII—a court is without power to impose *any* remedy under § 706(g). *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558-559. And there has not been—*and there cannot be*—a determination that the employer's conduct was challenged in *this* case in a manner permitting imposition of a remedy under § 706(g) for the benefit of subclass B. Because the procedural history of this case is so complex, we demonstrate this with some care.

It is correct, to be sure, that both the district court and the court of appeals have found TWA's pregnancy-motherhood rule to be inconsistent with the substantive commands of Title VII. While that question is not finally resolved—this Court has granted TWA's petition for certiorari to review that holding, No. 78-1549—the union as a matter of policy has no quarrel with the result flowing from that holding. The union's objection to the settlement agreement was not with its providing retroactive seniority to the victims of TWA's rule on whose behalf a timely challenge was made, but with its providing such seniority to those who—because no timely challenge had been made—no longer had a claim for relief under Title VII.

Plaintiffs and the Government correctly note that the *district court* found a timely challenge here: that court deemed the violations "continuing" in nature, and thus concluded that even as to those in subclass B there was a timely challenge permitting judicial enforcement of Title VII. In view of its finding of a timely charge, the district court had no occasion to discuss whether the filing of a timely charge is a jurisdictional prerequisite, nor whether, if it is *not* a jurisdictional prerequisite but only a statute of limitations, there were circumstances present here that would justify the claim despite noncompliance with the time limits. In particular, the district court had no occasion to, and did not, address the question whether TWA had waived Title VII's requirement of a timely charge.

On appeal, the Seventh Circuit, *prior to the entry of the settlement agreement herein*, reversed the district court's holding that the alleged violations were "continuing" in nature, relying in part upon this Court's intervening decision in *United Air Lines v. Evans, supra.*[12] As a result, the Seventh Circuit ruled that no timely charge

[12] Since the District Court's finding of a violation was at that time totally without legal effect, the description of the case at AFL-CIO Br. 10 is entirely accurate. Plaintiffs' contrary contention, and their effort to dismiss that brief as "irrelevant to this case" (Pl. Br. 22, n. 38), is spurious.

was filed in this case on behalf of subclass B. That ruling has not been challenged in the petitions to this Court; it is thus definitively resolved that no timely charge was filed in this case on behalf of those persons.

The Seventh Circuit's reversal of the district court on the timely charge question compelled it to reach an issue the district court had not reached: whether there can be circumstances in which a Title VII claim can be adjudicated despite the absence of a timely charge, i.e. whether compliance with Title VII's time limits is a "jurisdictional prerequisite" to securing adjudication and remediation with respect to an alleged violation of Title VII. The Seventh Circuit concluded that compliance with the time limits *is* a jurisdictional prerequisite; that conclusion perforce compelled its ultimate holding that the claims on behalf of the subclass B cannot be adjudicated (and thus cannot be remedied under § 706(g)) in this action. In light of its holding on the "jurisdictional prerequisite" issue—a holding that leaves no room for "waivers" of Title VII's time limits—the Seventh Circuit had no occasion to, and did not, decide whether TWA actually had "waived" the time limits.

This, then, was the posture of this case at the time the district court imposed retroactive seniority for the benefit of subclass B: it had been conclusively resolved that no timely charges had been filed on behalf of those employees; and it had been decided (subject to possible review by this Court) that in the absence of a timely charge there can be *no* circumstances empowering a court to adjudicate a claim of violation and provide remedies therefor. Certainly, the "law of th[is] case" as of the date the district court ordered retroactive seniority for subclass B did not support its power to do so under § 706(g). The question that remains, and to which we now turn, is whether the decisions this Court may make on the issues now pending could establish, *post facto*, that the district court indeed *did* have power to enter that remedy under § 706(g).

Of course, if this Court were to affirm the Seventh Circuit's ruling that compliance with the time limits is a jurisdictional prerequisite, that would be the end of the matter. It would then have been conclusively determined that the district court was without power under § 706(g) to impose a remedy for the injuries suffered by subclass B. But even if this Court were to *reverse* the Seventh Circuit, and hold that the time limits are not jurisdictional, it would remain true that the district court had no such power under § 706(g). In that event, the question would remain whether plaintiffs have shown an adequate justification for avoiding the time limits. There are three possible dispositions this Court might make with regard to TWA's alleged waiver of a timeliness defense:

(i) This Court might reach the "waiver" issue and decide, as TWA contends, that TWA did *not* waive its time limits defense.[13] In that event, again, it would be

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[13] We believe that TWA did *not* waive its time limits defense. Plaintiffs have two contentions on the waiver issue: (1) TWA did not raise this defense in its original Answer (though it did in an Amended Answer); and (2) TWA waived the defense pursuant to the aborted 1971 settlement. The second contention was rejected in *Consolidated*, IFFA Pet. at 57a, on the sound proposition that a party cannot be bound by a concession made as part of a settlement that is subsequently overturned. The first contention is wrong for several reasons demonstrated in TWA's brief. First, in its original Answer, TWA stated that it was without sufficient knowledge to answer Plaintiffs' contention that the time limits were met, and this had the effect of a denial. J.A. Vol. I, pp. 11a-12a; Rule 8(b) F.R.Civ.P. TWA cannot be criticized for not affirmatively raising this defense if it was without knowledge at that time as to whether Plaintiffs had complied with the time limit. Second, regardless of whether the time limits are jurisdictional, it clearly was the law of the Seventh Circuit at the time TWA filed its original Answer that the time limits were jurisdictional (and therefore could be raised later even if not specifically raised in an Answer). Thus, TWA cannot be penalized for not raising timeliness initially. See, *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357,

conclusively established that the district court was without power to provide a remedy under § 706(g).

(ii) This Court might decline to reach the "waiver" issue, preferring that it be addressed in the first instance by the district court. In that event, it might appear at first blush that the question of the district court's power under § 706(g) should be remanded with the waiver issue, to depend on the latter's determination. But as explained in (iii) below, the court's power under § 706(g) to impose retroactive seniority does *not* depend alone on whether *TWA* waived the time limits rather, it depends as well on whether the *union* waived the time limits; and the absence of power to impose retroactive seniority is conclusively determined by the fact that *the union did not waive the time limits.*

(iii) This Court might reach the waiver issue and decide that TWA *did* waive the time limits. Even in that event, the district court would have been without power under § 706(g) to impose retroactive seniority in derogation of the collective agreement. The union, as a party to the agreement, was required to be joined as a party to any proceeding in which derogation of its agreement was sought; and as a party to the action, the union was entitled to assert any defense that would protect its agreement. Thus, absent a waiver *by the union* of a time limits defense, the court had no authority to proceed on claims that were time-barred and impose a remedy therefor that takes from the union the fruits of its contract (see p. 3, *supra*).

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359 (7 Cir.) and *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 719 (7 Cir). Third, TWA *did* raise the defense in its Amended Answer. Those courts holding that compliance with the time limit is not jurisdictional have allowed the defense to be raised as late as at trial unless plaintiffs can demonstrate that they were severely prejudiced by the *delay*. See, for example, *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 476 (D.C.Cir.); *Pierce v. County of Oakland*, —— F.2d ——, 26 FEP 450 (6 Cir. 1981).

In sum, the rulings at the time the district court imposed retroactive seniority established an absence of power in that court to take that action under § 706(g), and none of the alterations that this Court might make in those rulings in the cases now before it could result in vindicating, *post facto*, the district court's power to have taken that action.

3. Plaintiffs seize upon the fact that IFFA has not contested the award of retroactive seniority relief to members of subclass A. They state, quite incorrectly:

> . . . With respect to subclass A, the union therefore must concede that the court's order does not "change the contractual seniority rules," deprive the union "of its contractual rights," nullify "valuable competitive status seniority rights" of incumbents, or override "IFFA's collective bargaining agreement." [Pl Br. 41, footnotes omitted].

We concede none of these propositions; nor is such a concession implicit in our position. The court's order does change the contractual seniority rules in favor of subclass A, and has all the other consequences described but denied by plaintiffs. Absent approval of such action by the union, the award in favor of subclass A would be subject to the same legal objection as the award to subclass B—that it is an order that the court was without statutory or constitutional authority to enter *as a settlement* without the union's approval. But the union has chosen, as a matter of policy, not to object to awarding retroactive seniority to subclass A, thereby waiving its contractual rights to that extent. The union's authority to do so is quite clear under *Franks*, *supra*. The Court there said:

> The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by

> other employees under the previous seniority agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests. [424 U.S. at 778-779].

Nothing required the union to choose, in exercising its contractual rights, between objecting to the grant of retroactive seniority for all the plaintiffs, or for none of them. The union's right to insist that the contractual seniority provisions are not to be overridden in favor of subclass B without a final, judicial determination that this subclass was entitled to such relief under Title VII is not forfeited by its acquiescence in the award of such relief to subclass A.

Plaintiffs seek to minimize the difference between the subclasses, and assert that the "union's protest [to granting seniority to the members of subclass B] is not rooted in principles of collective bargaining" (Pl. Br. 41). But the "protest" which is before this Court is to a judicial order which overrides a collective bargaining agreement, and thus is indeed rooted in principles of collective bargaining, as well as the more general and fundamental principle that the courts below were without statutory or constitutional authority to deprive the union of any of its contractual rights without its consent in the guise of effectuating a settlement agreement between two other parties. The soundness of the union's choice between subclass A and subclass B in determining to what extent the union would assert its contractual rights is not for the plaintiffs to question, because it is the union's contractual right, and not that of the plaintiffs. But though it is clearly irrelevant, we have no hesitancy in informing the Court as to the reason for the union's course. IFFA believes that TWA's pregnancy-motherhood policy was wrong. But IFFA believes also,

both as a matter of policy and law that the claims of subclass B are time-barred. The very purpose which is served by a statute of limitations is repose, and the union believes as a matter of collective bargaining policy that the expectations of the incumbent employees under the seniority provisions of the agreement outweigh any equities on the part of the members of subclass B.

CONCLUSION

For the reasons stated herein, and in our opening brief, the judgment of the Court of Appeals in No. 80-951 should be reversed.[14]

Respectfully submitted,

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[14] Reversal of the judgment in No. 80-951 would leave intact the settlement agreement between plaintiffs and TWA, since that agreement sought, but was not conditioned upon, approval of retroactive seniority to the plaintiffs. On that basis it would be appropriate for the Court to dismiss the writs of certiorari in both Nos. 78-1545 and 78-1549.